CAUSE NO. D-1-GV-14-00581

THE STATE OF TEXAS,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
	§	53rd JUDICIAL DISTRICT
XEROX CORPORATION; XEROX STATE HEALTHCARE, LLC; ACS HEALTHCARE LLC, A XEROX CORPORATION,	§	
	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

RELATORS' JOINT MOTION FOR DETERMINATION OF RELATORS' SHARE AND FOR EXPENSES, ATTORNEYS' FEES, AND COSTS PURSUANT TO TMFPA §36.110

COME NOW Relators Christine Ellis, DDS, Madelayne Castillo, Mary Espinoza, Mireya Miranda, Yarubi Morales, Deelcy Ocon, Sealed Party No. 1, and Sealed Party No. 2, and file this Relators' Joint Motion for Determination of Relators' Share and For Expenses, Attorneys' Fees, and Costs Pursuant to TMFPA §36.110, and would respectfully show the Court as follows:

I. SUMMARY OF MOTION AND REQUESTED RELIEF

Nearly seven years ago, and more than two years before the State of Texas brought its own lawsuit, a series of whistleblowers brought their own lawsuits against Xerox State Healthcare, LLC (f/k/a ACS State Healthcare LLC and now known as Conduent State Healthcare, LLC) for violations of the Texas Medicaid Fraud Prevention Act (TMFPA). The State chose to intervene in several of these cases, recognizing that these lawsuits brought viable claims against Xerox. The State thereby endorsed each of these whistleblowers (i.e., *qui tam* "Relators") and vested them with statutory rights under the TMFPA. Indeed, the State has repeatedly endorsed these Relators

in prior pleadings and in other cases, acknowledging that the facts alleged in its later-filed case are also "facts underlying the pending actions" brought by these Relators.

The State and Defendants have now reached a settlement. See Settlement Agreement and Release attached as **Exhibit 1**. That settlement acknowledges that "the State shall be solely responsible to reimburse any relator or relator's counsel for any amounts in any manner arising from the Covered Conduct to be awarded to such relator or relator's counsel pursuant to provisions of state or federal law, or that are otherwise agreed by the State to be paid to such relator or relator's counsel …." (p. 14). It does not, however, make any provision for payment of a specific award to Relators. Relators therefore file this Joint Motion for Determination of Relators' Share and for Expenses, Attorney's Fees, and Costs Pursuant to TMFPA §36.110.[1] While the determination of the relator's share in a Medicaid fraud case typically is reserved until the conclusion of a case, Relators bring this motion to the Court's attention to preserve their statutory rights under the TMFPA, including a "relator's share" of 15-25% of the State's recovery, whether by trial or settlement, along with reasonable expenses and attorney's fees, and costs, payable by Xerox.[2] *See* TEX. HUM. RES. CODE § 36.110.

Relators anticipate seeking a 20% relators' share, consistent with case law and the guidelines typically applied to *qui tam* cases. To streamline the resolution of this issue, however, Relators propose the Court require parties to submit additional briefing as to the exact percentage

[1] While the State's intervention in multiple TMFPA lawsuits could give rise to a dispute among Relators as to what percentage of recovery each Relator is entitled out of the statutory share, the Relators here have resolved any potential issues (e.g., "first to file," etc.) amongst themselves and file this motion with one voice.

[2] *See e.g., United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1036 (6th Cir. 1994); *Roberts v. Accenture, LLP*, 707 F.3d 1011, 1017-18 (8th Cir. 2013)(noting that in federal False Claims Act cases, the relator's share determination "only comes into play at the conclusion of a case, after the action has already proceeded to a judgment or a settlement.").

of the Relators' share to which they are entitled (i.e., within the 15-25% range), as well as evidence supporting their statutory claim for expenses, attorney's fees, and costs.

II. PROCEDURAL & FACTUAL HISTORY

A. Each of the Relators Brought Their Lawsuits Against Xerox Before the State Brought Its Own Lawsuit

Each of the Relators in this case brought a TMFPA lawsuit against Defendant Xerox Corporation and/or Conduent State Healthcare, LLC (f/k/a Xerox State Healthcare, LLC, f/k/a ACS State Healthcare, LLC) more than two years before the State filed the present lawsuit on May 9, 2014. *See* TEX. HUM. RES. CODE §36.101 (authorizing private action), 36.102(a),(b). Because some of these lawsuits may still be under partial seal, Relators present the following chart identifying information believed to be already in the public domain:[3]

Relator	**Style**	**Date Filed**
[Sealed Party No. 1]	*[SEALED]*	Feb. 28, 2012
Christine Ellis, DDS	*State of Texas ex rel. Ellis v. Xerox State Healthcare, LLC, et al.,* No. D-1-GV-12-000435 (Travis Co.)	April 24, 2012
Mireya Miranda	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-000457 (Travis Co.)	April 27, 2012
Madelayne Castillo	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-000653 (Travis Co.)	May 23, 2012
Madelayne Castillo and Deelcy Ocon	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-1200656 (Travis Co.)	May 23, 2012
Mary Espinoza	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-000659 (Travis Co.)	May 23, 2012

[3] Because some defendants remain under seal in each of these cases, Relators do not attach as exhibits either the cover pages or the petitions themselves, and limit the caption to only the Xerox entities named. The petitions themselves can be provided to the Court for *in camera* inspection upon request. In addition to the Sealed Party No. 1 case referenced above, there is an additional pending TMFPA lawsuit [Sealed Party No. 2] against ACS/Xerox filed by one of the undersigned counsel (Mr. Tucker) that remains under seal.

Yarubi Morales	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-001012 (Travis Co.)	July 27, 2012

B. The State Voluntarily Filed a Notice of Intervention In Each of These Cases, Thereby Triggering Relator's Statutory Rights Under TMFPA §36.110

In the ensuing months, the State intervened in each of the Relators' TMFPA lawsuits pursuant to TMFPA §36.102. By doing so, the State recognized each Relator's status as a person with a vested interest in any recovery against Xerox, whether that recovery occurred in the pending lawsuit or any alternate proceeding. *Id.* at §§36.109, 36.110. The following chart summarizes the State's date of intervention in each Relator's lawsuit:

Relator	**Style**	**Date of Intervention**
[Sealed Party No. 1]	*[SEALED]*	[sealed/na]
Christine Ellis, DDS	*State of Texas ex rel. Ellis v. Xerox State Healthcare, LLC*, No. D-1-GV-12-000435	June 25, 2012
Mireya Miranda	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-000457 (Travis Co.)	June 6, 2014
Madelayne Castillo	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-000653 (Travis Co.)	June 6, 2014
Madelayne Castillo and Deelcy Ocon	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-1200656 (Travis Co.)	June 6, 2014
Mary Espinoza	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-000659 (Travis Co.)	June 6, 2014
Yarubi Morales	*State of Texas ex rel. Alvarez v. ACS State Healthcare, LLC, et al.*, No. D-1-GV-001012 (Travis Co.)	June 6, 2014

See, e.g., **Exhibit 2**, *State of Texas's Notice of Intervention* (Ellis case). The State's notices of intervention appear to remain under seal in the other cases, as do the agreed motions to unseal and abate in each of these cases including the Ellis case. Out of caution, Relators do not attach them

to the present motion, though the corresponding orders partially unsealing each of these cases are in the public domain and referenced below.

Finally, in the Settlement Agreement and Release, the State confirmed that it "intervened in a number of other actions bought in its name by *qui tam* relators," and described those actions as "Related Actions." See **Exhibit 1**, at 3-4.

C. The State's Decision to File Its Own Lawsuit in May 2014

In May 2014, the State filed its own lawsuit against the Xerox Defendants in Cause No. D-1-GV-14-000581 (the "-581 lawsuit"), alleging violations of the Texas Medicaid Fraud Prevention Act. Although filed under a new cause number, the State's -581 lawsuit against Xerox constitutes an "alternate remedy" proceeding under §36.109, thereby entitling Relators to recover a portion of the "proceeds of the action" under the TMFPA. See **Exhibit 3**, *Letter from Ray Winter to Rusty Tucker*, Feb. 18, 2014 (confirming that his "Sealed Party" client had the first-filed TMFPA case against ACS/Xerox on February 28, 2012 and stating that taking the action requested by the State would not impact "your status as first to file"); **Exhibit 4**, *Letter from Charles Siegel to Ray Winter*, Sept. 12, 2017(confirming that Dr. Ellis' rights were already vested in the Xerox case); **Exhibit 5**, *Letter from Dan Hargrove to Ray Winter*, Jan. 26, 2015 (confirming the Attorney General's position that a new TMFPA lawsuit against already-named and intervened defendants does not diminish Dr. Ellis' rights under TMFPA §36.109 or 36.110). The State sought and received, from each Relator, an agreement to abate the pending TMFPA lawsuits to allow the State to proceed under a new cause number. **Exhibit 6**, *Order Granting Unopposed Motion to Partially Unseal and Abate* (Ellis); **Exhibit 7**, *Order Granting Motion to Partially Unseal and Abate* (Miranda); **Exhibit 8**, *Order Granting Motion to Partially Unseal and Abate* (Castillo); **Exhibit 9**, *Order Granting Motion to Partially Unseal and Abate* (Castillo/Ocon); **Exhibit 10**, *Order Granting*

Motion to Partially Unseal and Abate (Espinoza); **Exhibit 11**, *Order Granting Motion to Partially Unseal and Abate* (Morales).

D. The State Has Repeatedly Endorsed These Relators, Including in Its Separately-Filed Lawsuit

The State has acknowledged, in prior briefing to this Court, that "the facts underlying this case [i.e., its later-filed TMFPA lawsuit] are facts underlying the pending actions" previously filed by Relators. **Exhibit 12**, *State of Texas's Motion to Strike Petitions in Intervention*, filed June 9, 2014, at 7 and Appendix 1 (identifying Relators Ellis, Miranda, Castillo, Ocon, Espinoza, and Morales).[4] As this Court will recall, the State repeatedly relied on the fact that: (1) each of these Relators previously had filed TMFPA lawsuits against ACS/Xerox; and (2) the State had intervened in these lawsuits, as a critical, and ultimately successful, argument to keep other parties from intervening in its Xerox lawsuit. In fact, in a subsequent brief the State went further, stating:

> **The State's claims in this case are based on facts underlying not one, but six pending actions** that are brought under subchapter C [of the TMFPA]. Once those *qui tam* petitions were filed, no other persons could intervene.

Exhibit 13, *State's Reply to Intervenors' Opposition to Motion to Strike and Response to Plea the Jurisdiction*, filed Sept. 12, 2014, at 6.

Particularly with regard to Dr. Ellis,[5] the State has repeatedly described her in open court and in pleadings as a "bona fide relator" who the State has endorsed time and again in litigation arising from her original 2012 TMFPA lawsuit. The following examples are from other cases in the State's pursuit of other defendants originally named in Dr. Ellis' lawsuit along with Xerox:

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[4] Unfortunately, the Appendix contains several typographical errors; the correct dates of filing and intervention and the cause numbers of the pending TMFPA cases, can be found in Section II.A-C, *supra.*

[5] Relators note that repeated references to the State's prior, public endorsements of Dr. Ellis should not be viewed by the Court to diminish the State's endorsement of the other Relators. It simply reflects the fact that the State chose to pursue some of the other Defendants named by Dr. Ellis in separate actions, thereby resulting in additional litigation and occasions to publicly endorse her status as a Relator.

- "**The Attorney General wants to reaffirm that he considers Dr. Christine Ellis a bona fide relator.** The Attorney General intervened in Dr. Ellis's *qui tam* lawsuit after evaluating her initial disclosures, interviewing her, and determining that the knowledge and information she brings to the case was independent of and materially added to the allegations (if any) that were publicly disclosed…. Because **we have intervened in this case and we endorse this relator as a person with information that advances the interests of the State**, we oppose her dismissal pursuant to section 36.113(c). **Exhibit 14**, *Letter to Judge Naranjo*, Texas ex rel. Dr. Ellis v. ASDC Holdings, LLC, et al., Cause No. D-1-GV-12-000863, Aug. 15, 2013 (successfully opposing Defendant's Motion for Summary Judgment) (emphasis added);

- "You are going to hear or you're likely to hear arguments from Mr. Kharod, and I will briefly highlight them because we put them in our pleadings and you've heard them before, that the **state of Texas has endorsed this Relator. When the State of Texas intervened in the under seal qui tam action before the State of Texas initiated its election of alternate administrative remedy in this case, we endorsed this Relator and we said this is a bona fide Relator**. And you've already seen the briefing as it was brought up in our prior case and we've restated it in our pleadings in this case." **Exhibit 15**, *Hearing Transcript*, Harlingen Family Dentistry v. Texas HHSC-OIG and Dr. Ellis, HHSC-Appeals Docket No 13-0642-K, Jan. 16, 2014, at 49:17-50:21;

- "The State asks the ALJ to defer to the **Attorney General's endorsement of Dr. Ellis as a bona fide relator, and his objection to her dismissal.** Dr. Ellis meets the criteria set forth in sections 36.113(a), (b), and (c). Moreover, **the knowledge she brings to the proceeding aids in the purpose the Legislature and the federal government tasked to the State of Texas: to combat Medicaid fraud**." **Exhibit 16**, *Inspector General's and Relator's Response to Plea to the Jurisdiction and Motion to Strike Relator*, Harlingen Family Dentistry v. Texas HHSC-OIG and Dr. Ellis, HHSC-Appeals Docket No 13-0642-K, at 13-14 (further noting that the Attorney General's intervention signals "the State's judgment that a relator contributes to the case.");

- In an advisory to an administrative law judge, the Attorney General documented previous unsuccessful attempts by defendants to challenge Dr. Ellis as a TMFPA relator, highlighting rulings by previous administrative law judges, as well as Travis County District Judges Hon. Tim Sulak and Hon. Orlinda Naranjo. Relevant to this case, the State noted "[i]n each instance, the court rejected the same arguments …, holding that Dr. Ellis was not barred from participating as a Relator, with her rights protected under Section 36.109." **Exhibit 17**, *Respondents' Joint Response to Petitioners' Motion to Strike Dr. Ellis Under 36.113(a)*, M&M Orthodontics, PA, et al., v. Texas HHSC-OIG and Dr. Ellis, SOAH Docket No. 529-14-3087, 529-14-3088, at 4-5.

III. ARGUMENTS & AUTHORITIES

A. The TMFPA Entitles Relators to a Minimum 15% Share of the State's Recovery From the Xerox Defendants, Along with Expenses, Attorney's Fees, and Costs

1. Statutory Framework of the TMFPA Relator's Share Provisions

The TMFPA authorizes a private party, i.e., a Relator, to bring a civil action in one's own name and of the State. *See* TEX. HUM. RES. CODE § 36.101. Before the lawsuit is filed, under seal, the Relator must serve a copy of the petition, along with written disclosures of material evidence and information, to the State's Office of Attorney General. *Id.* at §36.102. Once the suit is filed, the State has three options: (1) it can decline to intervene in the action, leaving the Relator the choice whether to proceed without the State's participation; (2) it can intervene and proceed with the Relator's action; or (3) it can intervene, and pursue the action through "any alternative remedy available to the State," including an administrative proceeding or any other proceeding. *Id.* at §36.104(a),(b) (State's decision); §36.109 (alternate remedy).

A relator has the "same rights" under the TMFPA whether a recovery occurs against an intervened defendant in court, the administrative process, or through informal resolution: "If an alternate remedy is pursued in another proceeding, the person bringing the action has the same rights in the other proceeding as the person would have had if the action had continued under this subchapter. *Id.* at §36.109(a). In this case, the State clearly chose to intervene in each of Relator's TMFPA lawsuits, but then chose to file its own lawsuit (the "581 Action") as an alternate remedy to pursue the allegations against the Xerox Defendants. Nevertheless, Relators are entitled to their statutory share of any recovery, including settlements, of an action against the Xerox Defendants, and well as recovery of reasonable expenses, attorney's fees, and costs. *See* Tex. Hum. Res. Code §§36.110(a).

Specifically, Section 36.110 states:

Sec. 36.110. AWARD TO PRIVATE PLAINTIFF.

a) If the state proceeds with an action under this subchapter, the person bringing the action is entitled, except as provided by Subsection (b), to receive at least 15 percent but not more than 25 percent of the proceeds of the action, depending on the extent to which the person substantially contributed to the prosecution of the action.

…

(c) A payment to a person under this section shall be made from the proceeds of the action. A person receiving a payment under this section is also entitled to receive from the defendant an amount for reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred. The court's determination of expenses, fees, and costs to be awarded under this subsection shall be made only after the defendant has been found liable in the action or the claim is settled.

(d) In this section, "proceeds of the action" includes proceeds of a settlement of the action.

Id. at §36.110 (emphasis added). It is undisputed that the State has intervened in Relators' TMFPA lawsuits, thereby signaling its intent to proceed against the Xerox Defendants, regardless of whether its pursuit of these Defendants is in their original cause numbers or a separately-filed lawsuit. According to the plain language of Section 36.110(a), therefore, Relators are entitled to receive at least 15% of the "proceeds of the action," with the actual percentage open to upward adjustment based upon the extent each "substantially contributed" to the prosecution. Relators are also entitled to payment by Defendants of their reasonable expenses, attorneys' fees and costs.

2. Federal Law and Agency Guidelines Support Relators' Position

Given the relative lack of Texas jurisprudence applying the TMFPA, federal case law and materials applying the federal False Claims Act are instructive. *See United States v. Catholic Health Initiatives*, 312 F.Supp.3d 584, 606 (S.D. Tex. 2018); *United States ex rel. Williams v. McKesson Corp.*, 2014 WL 3353247, at *4 (N.D. Tex. Jul. 9, 2014) (acknowledging textual differences between the statutes yet noting they are "analogous" and "depend[ent] on the same operative facts and legal requirements").

Numerous authorities recognize the relator's right to recover at least 15% as a relator's share in an intervened case, barring exceptions which are not present here. *See* S. Rep. 99–345, 1986 U.S.C.C.A.N. 5266, 5293 (describing the 15% minimum as a "definite amount" which could "be looked upon as a 'finder's fee' which the person bringing the case should receive as of right");[6] *see also United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011); *United States ex rel. Peterson v. Sanborn Map Co., Inc.*, 2014 WL 1400131 (E.D. Mo., Apr. 10, 2014); *United States ex rel. Johnson v. Universal Health Servs.*, 889 F.Supp.2d 791 (W.D. Va. 2012)(awarding 20% award after recognizing that 15% "generally been regarded as a finder's fee to which the relators are entitled even if their only involvement in the suit was merely to file the action."). The statute, and the applicable law is clear: once the State chose to intervene in Relators' TMFPA lawsuits, it guaranteed at that point in time that Relators' share would be no less than 15% under Section 36.110(a).

The Eighth Circuit recently addressed the issue of calculating a relator's share under the FCA provision analogous to TMFPA § 36.110(a). In *Rille v. PriceWaterhouseCoopers, LLP*, 803 F.3d 368 (8th Cir. 2015), the court held that "the relator has a right to recover a share of the proceeds of the alternate remedy to the same degree that he or she would have been entitled to a share of the proceeds of an FCA action.' … [T]he government [cannot] deprive the relator of his right to recover simply by recasting the same or similar factual allegations in a new claim or by pursuing the substance of the relator's claim in an alternate proceeding." *Id*. at 373-74, quoting *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1010 (9th Cir. 2001). See also, e.g.,

[6] "If the Government comes into the case, the person is guaranteed a minimum of 15% of the total recovery even if that person does nothing more than file the action in federal court. This is in the nature of a 'finder's fee' and is provided to develop incentives for people to bring the information forward. The person need do no more than this to secure an entitlement to a minimum 15%." 132 Cong. Rec. H9382–03.

United States ex rel. Conner v. Mahajan, 877 F.3d 264, 268 (7th Cir. 2019) ("When the government pursues an 'alternate remedy' the relator has the same rights in that proceeding as if the qui tam action had continued, including the right to recover a percentage of any recovery."); *United States ex rel. Bledsoe v. Community Health Sys.*, 342 F.3d 634 (6th Cir. 2013).

Allowing the government to belatedly challenge a relator after intervention is contrary to the policy of the FCA and the TMFPA. The *qui tam* complaints in these cases served their primary purpose of providing the government sufficient information to pursue an investigation into a defendant's fraudulent conduct. Moreover, as several courts have noted, the statutory share awarded to Relators is not meant merely to provide an incentive to report fraud that may not otherwise have come to the government's attention; it also provides a mechanism to remedy the "substantial harm" that a *qui tam* relator suffers by choosing to be a whistleblower, including "severe emotional strain, … substantial ramifications to the relator's employment, and financial burdens. It is often difficult, if not impossible, to measure the harm suffered." *United States ex rel. Johnson-Pochardt v. Rapid City Reg. Hosp.*, 252 F.Supp.2d 892, 902 (D. S.D. 2003) , *citing United States v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1993) (noting the "Hobson's choice" relators face between keeping silent and suffering potential liability, versus reporting the fraud and suffering the financial and reputational repercussions).

Because Texas has no published relator share guidelines, the U.S. Department of Justice's Relator Share Guidelines are also instructive. As the DOJ guidelines state:

> [T]he legislative history suggests that the 15 percent should be viewed as the minimum award – a finder's fee – and the starting point for a determination of the proper award. When trying to reach agreement with a relator as to his share of the proceeds, or proposing an amount or percentage to a court, we suggest that you begin your analysis at 15 percent. Then consider if there are any bases to increase the percentage based on the criteria set forth below.

Exhibit 18, *U.S. Dep't of Justice Relator Share Guidelines* (emphasis added); *see Sanborn, supra,*

2014 WL 1400131 at *4 (resolving that a 19% share – which was higher than the 15% minimum but not the 25% maximum requested by the relator – was appropriate when the evidence showed the relator identified a fraud, provided documents, and met with government investigators to contribute more than a "bare minimum," but did not play a more active role, albeit at the government's insistence, after intervention). The DOJ Guidelines enumerate various factors that could militate in favor of a higher or lower share within the 15-25% range, noting that the statutory FCA exceptions to lower the relator's share below that zone occur when the relator's complaint is "based primarily on public information" or if relator "planned and initiated the fraud." See Exhibit 18. Similar exceptions exist in the TMFPA, i.e., in sections 36.110(b) or 36.111. As discussed below, neither circumstance is present here.

B. None of the Exceptions to a Lower Relator's Share Are Applicable

There are only two exceptions to the minimum 15% relator's share specified in §36.110(a). One such exception is if the relator herself was responsible for planning and initiating the underlying Medicaid fraud; it is undisputed that this exception is inapplicable in this case. *See* TEX. HUM. RES. CODE § 36.111(a). The other such exception is if the relator's TMFPA lawsuit was based upon a public disclosure, as defined by §36.110(b), which states:

> (b) If the court finds that the action is based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a Texas or federal criminal or civil hearing, in a Texas or federal legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award the amount the court considers appropriate but not more than 10 percent of the proceeds of the action. The court shall consider the significance of the information and the role of the person bringing the action in advancing the case to litigation.

TEX. HUM. RES. CODE § 36.110(b). In short, a relator's award of less than the statutory minimum 15% requires a judicial determination that "the action," i.e., relator's lawsuit, is based primarily upon disclosures of specific information from an enumerated, finite list of sources other than

information provided by the relator herself. Notably, §36.110(b) does not prohibit a relator from relying upon information from other sources outside her personal knowledge or information; it only reduces her share if her lawsuit is "primarily" based on disclosures of "specific information … relating to allegations or transactions in a Texas or federal civil or criminal hearing, a Texas or federal legislative or administrative report, hearing, audit, or investigation, or from the news media." *Id.*

Relators anticipate the State may attempt to argue that the Relators' share should be capped at ten percent, but the State will not be able to demonstrate that any Relator's lawsuit was "primarily based" upon these outside sources of information. First, the State has already acknowledged that its lawsuit is based on the same facts as Relators' previously-filed lawsuits. See Exhibits 12-13, *supra*. It is inconceivable that the State would hold these Relators close, to ward off other parties from intervening in the lawsuit, when it suited the State's purpose, but then attempt to distance itself from these same Relators when they attempted to assert their vested statutory rights to share in the recovery.

Moreover, as discussed above, the State has repeatedly stood side by side with Dr. Ellis in previous hearings on motions to dismiss or motions for summary judgment, either in Travis County District Court or in the administrative process, in which various other defendants attempted to strike or dismiss Dr. Ellis' *qui tam* claims on the basis of an alleged "public disclosure." In each of those instances, the State argued – successfully– that she was a bona fide relator whose TMFPA lawsuit was based on various sources, including her personal experiences, insights, treatment of patients, and contacts gained from over 16 years as a practicing orthodontist with experience and familiarity with the Texas Medicaid program, as well as independent analysis and research of

documents and materials relevant to the scourge of dental Medicaid fraud in Texas. See, e.g., Exhibits 14-17, *supra.*

Finally, to the extent that the State may argue that its own lawsuit was based on its own investigation and audits of Xerox which predated any of Relators' lawsuits, any such argument is rebutted by the State's own public statements regarding its Xerox lawsuit. On May 8, 2014, the Attorney General's office issued a press release announcing the initiation of its own lawsuit against the Xerox Defendants. **Exhibit 19**, *OAG Press Release*, May 8, 2014. The release stated that its lawsuit "reflects the culmination of a lengthy multi-agency investigation into orthodontic Medicaid fraud," citing a dental and orthodontic Medicaid fraud task force between the Attorney General's Office, Texas HHSC, and HHSC-OIG which formed in "June of 2012." Id. By its own timeline, then, the State's interagency task force began in June 2012, months after the majority of Relators had already filed their lawsuits against Xerox and submitted their presuit disclosures under seal, after the State filed its Notices of Intervention in at least one of the cases, and Relators and their counsel had met with the Office of Attorney General's Civil Medicaid Fraud Division to provide factual information.

C. Texas Cannot Treat TMFPA Relators Less Favorably Than Federal FCA Relators

Under the Deficit Reduction Act of 2005, a state is eligible to receive a larger share of monies recovered from Medicaid fraud settlements if the state's Medicaid fraud statute meets the federal requirements. *See* 42 U.S.C. §1396h. Texas currently receives this bonus because the TMFPA meets the federal requirements. **Exhibit 20**, *Letter from Daniel Levinson, HHS-OIG, to Texas Attorney General Kenneth Paxton*, Dec. 28, 2016 (certifying that the TMFPA is eligible for the 10% bonus by meeting federal requirements). Importantly for this case, one of the federal requirements is that the TMFPA "contains provisions that are at least as effective in rewarding and

facilitating qui tam actions for false or fraudulent claims as those described in [the federal False Claims Act]. *Id.*, §1396h(b)(2)(emphasis added). If the State were to argue that Relators in this case were not entitled to a minimum relator's share of 15% under the TMFPA, the State would not only be turning its back on Relators after endorsing them for years, it could also jeopardize its ability to retain a greater percentage of Medicaid fraud recoveries in the future because its intransigence would make it noncompliant with the Deficit Reduction Act's incentive provision.

IV. CONCLUSION & PRAYER

As detailed above, nearly seven years have passed since Relators each brought lawsuits against the Xerox Defendants for violations of the Texas Medicaid Fraud Prevention Act. The State intervened in each of the above named lawsuits and, as to the Sealed Party case referenced in Exhibit 3, *supra*, the State recognized that case as being the "first *qui tam* case under the TMFPA against ACS (Xerox)." The State also explicitly confirmed that Relators retain the same rights in its later, separate suit that they possess in their own suits, and repeatedly supported them as bona fide Relators.

In filing this motion, Relators seek no more than what they are entitled under Texas law: an award of a Relator's share of between 15-25% of the State's total recovery from Xerox, as well as their reasonable expenses, attorney's fees, and costs payable by Xerox, as mandated by the TMFPA. Relators also respectfully request any additional relief to which they are justly entitled in law or equity.

Respectfully submitted,

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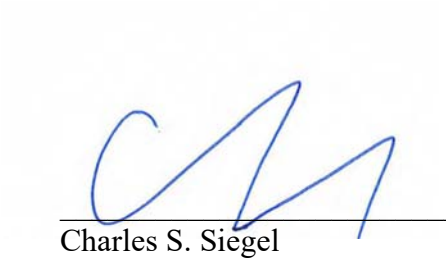
CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2019 the foregoing instrument has been served electronically to all counsel of record in this case.



Charles S. Siegel